UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 12

PRE-CAST SPECIALTIES, INC.

Employer

-and-

Case 12-RC-139665

CONSTRUCTION AND CRAFT WORKERS
LOCAL UNION NO. 1652

Petitioner

PETITIONER'S ANSWERING BRIEF TO THE EMPLOYER'S
EXCEPTIONS TO HEARING OFFICER'S REPORT ON OBJECTIONS

Matthew J. Mierzwa, Jr.
MIERZWA & ASSOCIATES, P.A.
3900 Woodlake Blvd., Suite 212
Lake Worth, FL 33463
561-966-1200
561-966-1231 (facsimile)
mmierzwa@mierzwalaw.com
jgibson@mierzwalaw.com

TABLE OF CONTENTS

The Petitioner, Construction and Craft Workers' Local Union No. 1652 (Union or Local 1652) files this Answering Brief to the Employer's Exceptions to Hearing Officer's Report on Objections and Recommendation.

I. STATEMENT OF THE CASE

On October 28, 2014, Local 1652 filed a Petition seeking certification as representative of certain employees of the Employer. (Bd. Ex. 1(a)). On November 11, 2014, the parties entered into a Stipulated Election Agreement which was approved by the Region on November 21, 2014. (Bd. Ex. 1(b)). On November 25, 2014, the Regional Director corresponded with the Employer enclosing English, Spanish, and Creole Notices of Election. (Pet. Ex. 1). On December 9, 2014, the election was held among 192 eligible voters of which 121 cast for the Union, 64 cast against the Union, and 2 were declared void. (Bd. Ex. 1(c)).

On or about December 16, the Employer's Objection to Conduct of the Election and Conduct Affecting the Results of the Election were filed. On December 30, 2014, the Regional Director issued her Report on Objections, Order Directing Hearing and Notice of Hearing for January 7, 2015. (Bd. Ex. 1(f)). After the Regional Director twice denied Employer requests for postponement of the hearing (Bd. Ex. 1(g-j)), on January 7, 2015, the Board entered an Order Granting the Employer's Special Permission to Appeal and directed that the hearing be set between January 16 and 23, 2015. (Bd. Ex. 1(l-m)). On January 12, the Regional Director entered her Order Rescheduling Hearing (Bd. Ex. 1(n)) and, on January 16, 2015, the hearing was held.

After Local 1652 and the Employer filed briefs, on February 11, 2015, the Hearing Officer's Report on Objections (HORO) issued in which the Hearing Officer recommended that the Employer's objections be overruled in their entirety. On Tuesday, February 24, 2015, the Employer filed Exceptions to Hearing Officer's Report on Objections and Recommendation and Brief in

Support of Exceptions. This is the Union's Answering Brief.

II. STATEMENT OF THE APPLICABLE FACTS

As of November 25, 2014, it was clear that the "official secret ballot" would be printed in English, Spanish, and Creole. (Pet. Ex. 1; R. Ex. 2). Neither the Notices of Election nor any other document identified an agreement or need for a Haitian-Creole interpreter. (Bd. Ex. 1; Pet. Ex. 1).

Unbeknownst to the Union, the Employer had asserted to the Regional Director that a majority of the employees in the requested unit were of Haitian nationality, most of whom do not understand or read English. In response, the Regional Director agreed to have official ballots and notices of election in English, Spanish, and Creole; and further agreed to contract with a Creole-speaking interpreter to be present for the election. The Employer did not assert that any employee in the voting unit could not understand or read English, Spanish, and Creole. (Tr. 23). The Employer never asked the Union to reach an agreement to have a Haitian-Creole interpreter at the voting site. The Regional Director never asked the Union to agree to have a Haitian-Creole interpreter at the voting site. The Union never reached any kind of an agreement with the Employer or the Regional Director to have an interpreter at the voting site. In fact, the Union did not believe a Haitian-Creole interpreter was necessary. (Tr. 225-226).

Prior to the election, the Employer "created an educational campaign" utilizing "mailer information, meetings, arranging videos, and other ways . . . "When describing one video presented to employees, the Employer claimed it had purchase the video to show employees at a meeting which was strictly based on voting and the process, how things would go, so employees could be more familiar with what would be expected on the voting day. (Tr. 47-48). That video was in English, dubbed in Creole, with a Spanish-language interpreter. The Employer also distributed 15 - 20 different communications on paper referred to as fliers, which were translated from English to

Spanish or Creole. One particular flier described the voting process in detail. (ER. Ex. 5).

As noted by the Hearing Officer, the Employer had four meetings in which each meeting was devoted to a different topic. Each "meeting" was broken down into six groups where one was conducted in English, another was conducted in Spanish, and four were conducted in Haitian-Creole groups. In other words, there were 16 Creole meetings. An outside professional interpreter was utilized at every one of the meetings. Not only did that person transcribe fliers and participate in the meeting, but he answered all questions posed by Creole-speaking employees. (Tr. 49-50).

> He was both interpreting and also handling some questions. He was able to build rapport pretty quickly with the gentlemen. So there were several occasions where quite a few people would stay after to ask him specific questions.

(Tr. 53). At one meeting, the sample ballot was photocopied and presented to employees for discussion and questions. (Tr. 54-59; ER. Ex. 7).

There is ample record evidence to support the Hearing Officer's findings of fact with respect to the "Employer's educational campaign" which would have adequately prepared employees for the upcoming election. (HORO 4).

The election was scheduled for December 9, 2014, between 1:30 p.m. and 4:00 p.m. (Pet. Ex. 1). It was at the pre-election conference that the Union first learned of an agreement regarding a Creole interpreter. Unfortunately, the interpreter never arrived and at the conclusion of the pre-election conference, nobody had a problem with it. (Tr. 222-223).

When voters arrived, the Employer-observer, Stepha Gezner, and the Union-observer, Andre Auguste, checked the names of every voter. Gezner and Auguste would obtain the name and check the name with the employee-eligibility list with Gezner using a red pencil to check the name and Auguste using a blue pencil to check the name. (Tr. 204-205). After the first employee checked in, the person was handed a ballot and then voted. (Tr. 205). Every single person who showed up to

vote was able to vote. (Auguste, Tr. 206; Gezner, Tr. 187). The ballot shows that 187 people showed up to vote and all 187 employees voted with only two void ballots. (Bd. Ex. 1(c)).

The foregoing facts provide citations to record evidence supporting the factual findings of the Hearing Officer. (HORO 5-6).

III. LEGAL ARGUMENT ON THE ISSUES

A. The Employer's Reliance on Gory is Misplaced

During the Regional Director's administrative investigation, at the hearing, in its brief, and in its most recent brief, the Employer relies almost exclusively on the decision Gory Associated Industries, Inc., 275 NLRB 1303, 119 LRRM 1227 (1985) (Dennis dissenting). At every stage in this process, the Employer has simply relied on the incantation of Gory to support its case. Simply put, the Employer's reliance on Gory is misplaced.

Even if Gory is still good law, the critical facts of Gory are different than the critical facts in this case. In attempting to address the dissent of member Dennis, the two-member majority made the following comments:

> Prior to the election, the parties agreed that this electorate required Haitian Creole election materials and a Haitian-Creole interpreter. The interpreter arrived at the voting place approximately halfway through the election period.

275 NLRB at 1303, 119 LRRM at 1277-1278. The majority went on to say the evidence was sufficient as prima facie proof an objectionable failure to assure the effective and informed expression by all employees of their voting desires.[1]

The Employer's reliance on Gory is flawed for at least two reasons. The reasons relate to the

---

[1]In dissent, Member Dennis noted that there was an absence of "any showing that the translator's lateness affected the conduct of the election. The notice of election and the ballots were translated into Haitian Creole. There is no evidence that any Haitian Creole speaker needed and was deprived of a translator's assistance in voting.

critical quotation above where "the parties agreed that this electorate required Haitian Creole election materials and a Haitian Creole interpreter." (emphasis added).

First, in this case, the parties had no such agreement. It is undisputed that the Union was never asked and never agreed to a Haitian-Creole interpreter and did not even know it was an issue until the pre-election conference. Therefore, unlike Gory, in this case there was no agreement. Second, and perhaps more importantly, even if there was an "agreement" between the Employer and the Regional Director, the agreement was simply to provide an interpreter. With respect to the Regional Director's agreement, they proposed the following stipulation:

> In response to a request from the Employer, who asserted that a majority of the employees in the requested voting unit are of Haitian nationality, most of whom do not understand or read English, . . .

(Tr. 23). Note that in Gory there was an agreement between the parties that a Haitian-Creole interpreter was required. In this case, there was no agreement of the parties and the agreement between the Employer and the Regional Director involved a simple assertion by the Employer with no proof. The significance of the foregoing is obvious. On the one hand, in Gory, the parties agreed that the electorate required a Haitian-Creole interpreter. On the other hand, in this case, there was no agreement by anyone that this electorate required a Haitian-Creole interpreter. The Hearing Officer's analysis correctly distinguishes the facts of Gory from the facts in this case. (HORO 7).

In the Employer's Brief, the Employer claims that the Hearing Officer misconstrued Gory by focusing on *dicta* referring to an "agreement" between the parties. (ER. Brief, 16-17). The Employer misses the point. It not only is the fact that there was no agreement between the parties in this case, Gory involved an agreement that a Haitian-Creole interpreter was required. In this case, there was no agreement between anyone regarding a requirement of a Haitian-Creole interpreter. In this case, there was no more than assertion by the Employer that most of the voting unit are of

Haitian nationality who do not understand or read English.

In the absence of some type of agreement between the parties regarding the requirement of a Haitian-Creole interpreter, the Hearing Officer correctly imposed upon the Employer the burden to show that the failure of the Haitian-Creole interpreter to show up had some type of impact on voting.

B. The Record Evidence Supports the Hearing Officer's Conclusion that the Absence of an Interpreter Did Not Cause Confusion at the Polls

The analysis of the Hearing Officer is sound. In summary, the in the absence of an agreement that a Haitian-Creole interpreter was required (as in Gory), the Employer must show record evidence supporting its claim of objectionable conduct. The analysis of the Hearing Officer is summarized at the end of his Recommendation: Objection 6.

> What is missing from the record is any evidence that a single voter was confused because there was no Haitian-Creole interpreter or was otherwise unable to make an informed choice at the polls. Accordingly, I recommend that objection 6 be overruled.

(HORO 9).

First, the Employer attempts to support its argument regarding "confusion" by asserting the following: "Even though Creole is the first language of an overwhelming majority of the bargaining unit, only about 40 of these employees are capable of reading it. (Tr. p. 34, 46, 104)." (ER. Brief 3). The Employer's assertion that only about 40 of the Creole employees are capable of reading Creole is simply not supported by the record evidence indicated by the Employer. Consider the citations.

(1) The reference to the transcript at page 34 includes the following sworn testimony by the Employer's first witness: "And now their literacy in Creole, I'm not able to testify to." (Tr. 34). (2) With respect to the reference to the transcript at page 46, the Employer's witness testified that " . . . we believe they don't read, even in their native language. So we think it's a literacy challenge, as

well as a language barrier." (Tr. 46). The Employer is relying on the beliefs and thoughts of its witness. (3) With respect to the reference of the transcript at page 104, this second Employer witness, when asked as to the number of employees who are able to read Creole, she responded as follows: "I would say, out of that 140, to my knowledge, probably about 40 of them." (Tr. 104). The witness was not able to identify a single employee who could not read Creole.

Note what is happening here. The Hearing Officer concluded that the Employer had not established any employee who could not read Creole. In its Brief, the Employer is relying on citations to the transcript at pages 34, 46, and 104. The Employer has not made a case to overturn the findings and conclusion of the Hearing Officer in this regard. Simply put: "No witness identified a single employee as illiterate." (HORO 8).

Second, the Employer has not provided references to the record evidence which would cause a reversal of the Hearing Officer's finding that the Employer failed to produce evidence that there was confusion at the polls due to the fact that there was no Haitian-Creole interpreter. The record evidence amply supports the Hearing Officer's findings. (1) The undisputed testimony is that every single person who showed up to vote actually voted. (2) Andre Auguste testified that Creole-speaking workers can read Creole as well as speak it. (Tr. 215; Tr. 219). (3) The Employer is critical of the Hearing Officer for failing to "expressly discredit" the testimony of Gezner. (ER. Brief 9, fn. 10). There was no need to "expressly discredit" the testimony because the testimony was conclusory and vague and did not identify a single person who was confused.

This election was held on December 9, 2014. The Employer was granted an extension on the hearing date from January 7, 2015, to January 16, 2015. In other words, the Employer had more than five weeks to prepare for the hearing. Yet, the Employer did not produce a single witness who could testify that he or she was confused and did not produce a single witness who could even

identify a person who was allegedly confused.

In the absence of evidence that the electorate was confused by the voting procedures or unable to make an informed choice in the election, the Employer's election objections should be overruled and dismissed. Arthur Sarnow Candy Co., 311 NLRB 1137, 145 LRRM1207 (1993) affirmed, 40 F. 3d 552, 147 LRRM 2853 (2d Cir. 1994); NLRB v. Precise Casting Inc., 915 F. 2d 1160, 135 LRRM 2784 (7th Cir. 1990); Bridgeport Fittings, 288 NLRB 124 (1988), enforced, 877 F. 2d 180 (2d Cir. 1989).

IV. CONCLUSION

From the date the Employer filed the objections until today, the Employer apparently believes the mere incantation of Gory will provide the basis for setting aside the election. The Union would submit that Gory is not good law and, even it if is, it is distinguishable on the critical facts. In short, as found by the Hearing Officer, there is nothing in the record evidence that a single identifiable voter was confused because there was no Haitian-Creole interpreter or was otherwise unable to make an informed choice at the polls. Everyone who showed up voted with only two void ballots.

The Union would submit that the Hearing Officer's Report on Objections and Recommendation are supported by the record evidence and applicable law. The Employer's objections should be dismissed and the Union should be certified.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Answering Brief to Employer's Exceptions has been served this 3rd day of March 2015, via email and regular U.S. Mail addressed as follows: Margaret J. Diaz, Regional Director, Region 12, National Labor Relations Board at margaret.diaz@nlrb.gov, 201 East Kennedy Blvd, Suite 530, Tampa, FL 33602-5824; Steven M. Bernstein, Esquire, Fisher & Phillips, LLP, at sbernstein@laborlaw.com;

Charles S. Caulkins, Fisher & Phillips, LLP, at ccaulkins@laborlawyers.com; and Suhaill M. Morales, Esquire, Fisher & Phillips, Esquire, at smorales@laborlawyers.com. , 450 East Las Olas Blvd., Suite 800, Fort Lauderdale, FL 33301.

Respectfully submitted,

Matthew J. Mierzwa, Jr.
MIERZWA & ASSOCIATES, P.A.
Attorneys for Petitioner
3900 Woodlake Blvd., Suite 212
Lake Worth, FL 33463
561-966-1200
561-966-1231 (facsimile)

By: _____
Matthew J. Mierzwa, Jr.
Florida Bar No.: 0699860